

# Champagne at the Funeral

## - An Introduction to Legal Culture\*

**Jørn Øyrehagen Sunde**

### **A brief preliminary discourse**

In short, legal culture is ideas and expectations of law made operational by institutional (-like) practices. The concept of legal culture is, firstly, difficult to define, since ideas and expectations of law, and how they are made operational, are hard to identify precisely. Secondly, it is a concept that is hard to manage without, since, in the end, law in action is a question of how ideas and expectations of law are made operational by institutional (-like) practices. Thirdly, it is especially hard to manage without at a time when the law frequently crosses jurisdictional borders, which means that ideas and expectations of law, and the institutions that make them operational by means of their practices, are challenged and changed by encountering a multitude of other ideas, expectations and practices relating to the law.

This article aims to contextualise, arrange and analyse the legal culture phenomenon to ensure the concept is a subject for discussion. This will be achieved firstly by explaining why legal culture is a concept we would find hard to manage without, secondly, by contextualising and defining the concept of legal culture, and thirdly, by explaining how the concept is structured internally, and the historically relativistic character of this structure. The end result will be a preliminary insight into the phenomenon of legal culture.

### **Preparing for the funeral – why legal culture?**

Legal culture is a relatively recent term and has mainly played a role in the legal consciousness during the Twentieth and Twenty-first Centuries. This does not mean that the issues that legal culture is used to address are recent ones. Rather, legal culture as a phenomenon has been an issue for centuries, in fact for millennia, gaining renewed interest each time transjurisdictional law has encountered local law. That is, whenever law supersedes the boundaries of jurisdictions of defined entities like ethnic groups, realms and nations, encounter the law of such entities.

---

\* The article is published in *Rendezvous of European legal cultures* (eds. Jørn Øyrehagen Sunde, Knut Einar Skodvin), Bergen, Fagbokforlaget 2010: 11-28.

Etymologically, law means both what is held in common, and what is settled. In truth, law is a set of truly norms that are considered as valid for a community. Originally, law was valid for ethnical groups. The Laws of Moses were, for instance, only valid for the Jews and not other tribes in the area. Law was hence originally something held in common like religion, language and other customs. Law and culture were, to a very large extent, one and the same thing. It might even be argued that it is only after the long and slow emancipation of law from culture that the term legal culture emerges to display how culture still is a regulative force within law.

Travelling back in legal history, we have to stop off in Rome at the Empire's heyday to look at an example of the strength of the idea of law as a part of culture. As the capital of an expanding empire, attracting merchants, mercenaries etc. from afar, the Romans were confronted with the fact that law was as different among ethnic groups as other cultural elements. Instead of forcing Roman Law on the foreigners, they created a new institution specialized in dealing with a multitude of legal traditions. The *praetor urbanus* had, for more than a century, dealt with the legal suits filed by Roman citizens against fellow Romans, resolved in accordance with Roman law. *Praetor peregrinus*, on the other hand, was elected to deal with the suits filed by non-Romans, for which Roman law was not held to be applicable. Legal culture was not a concept used to explain and justify this arrangement, but the solution the Romans chose more than indicates an awareness of legal cultural as phenomena.

Roman law became the law of the entire empire when all its male inhabitants became Roman citizens in the 3<sup>rd</sup> century A.D. Roman law hence became transjurisdictional in its character in the latter part of Antiquity, meaning that it was valid for and applied by members of different ethnic groups within the empire as something common despite other differences, and despite the existence of other valid norms. However, at this time, Roman law supplemented more than excluded other sets of legal norms that were specific to different ethnic groups.

The transjurisdictional aspirations of Roman law would lie dormant from the slow breakdown of the Roman Empire till the High Middle Ages, many centuries later. Meanwhile, the Church replaced the empire as a transjurisdictional structure around the Mediterranean and in southern Europe, expanding into the north and northeast of the continent. Canon Law, namely church law, spread together with the Christian faith to the different European realms and existed as parallel law alongside to local norms. Canon Law was thus transjurisdictional in its character, since it was valid for all Christians at all places at all times. However, Isidor

of Seville, a bishop on the Iberian Peninsula, noted that, already in the Seventh Century, good laws were those adjusted to local conditions and customs.<sup>1</sup> This became a dominant idea within the Church in the Middle Ages, and only the transjurisdictional character of central parts of the Canon Law, namely the rules essential for salvation, was enforced, while the rest of the legal corpus was generously adjusted to the local culture, including the legal culture, in which it was applied. However, the concept of legal culture was never used.

The Church was split into an Eastern and Western Church in the first part of the Middle Ages, and the reformation during the 1500s severely reduced the extent of transjurisdiction of the Roman Catholic Church, and hence of Canon Law, even in Western Europe. The new system of law with transjurisdictional aspirations to emerge was natural law, which both consumed Roman law and drew on Canon Law. The general idea was that natural law was transjurisdictional – it was common to all humans at all times and in all places. When Charles Montesquieu published the widely-read *De l'esprit des lois* in 1748, he both subscribed to the idea of a transjurisdictional natural law, whilst, at the same time, advising lawmakers to make laws in accordance with local natural and cultural conditions, as two sides of the same coin.<sup>2</sup> Hence, transjurisdictional natural law became a kind of specific natural law, namely specific to different geographic areas, and lost much of its transjurisdictional features. Again, legal culture was not a concept used by Montesquieu, but in the aftermath, it might be said that for him, as for the Romans in Antiquity and the Church in the Middle Ages, legal culture was an unspoken factor taken into consideration.

The publishing of *De l'esprit des lois* marks the beginning of the end of natural law, not only because it was no longer viewed as transjurisdictional, but because of the emergence of the nation state. In both Antiquity and the Middle Ages, Roman and Canon Law drew much of its authority from the, for its time, well-functioning organisation promoting it – the Roman Empire and its legal institutions in Rome, and the Church with its institutions in the same city. The European realms in the Middle Ages and the Early Modern Period up until the French Revolution had a difficult time acquiring similar strong structures, and the law they produced was never held in the same high repute. During the Eighteenth Century, the European nation states grew stronger and were made well-structured and effective through a large and educated bureaucracy. This meant that the nation states were able to codify law, which they did from 1796 and onwards. The laws they produced could now compete with

---

<sup>1</sup> Isidorus Hispalensis and Stephen A. Barney, *The Etymologies of Isidor of Sevilla* (Cambridge: Cambridge University Press, 2006) 199 no. xxi.

<sup>2</sup> Charles de Secondat Montesquieu and Jean-Jacques Rousseau, *The Spirit of Laws*, ed. Mortimer J. Adler, Great books of the Western world (Cambridge: Cambridge University Press 1990) p. 9.

Roman and Canon Law in quality, extensiveness, and in the legitimacy and adoration of the state producing them. Still, Roman law remained an icon and an ideal for lawmakers and those applying the law in Europe throughout the 19<sup>th</sup> century.

Instead of starting with natural law, and adjusting it according to local factors, the lawmakers of the nation states could put natural law in a pot with local customs, Roman law and whatever else was at hand and seemed attractive, and compose new national law. Instead of a transjurisdictional law adjusted to local factors, law became national through codification from the end of the Eighteenth Century and throughout the Nineteenth Century in Europe. This was the law of the nation state, and national law became synonymous with good law, since it was in perfect harmony with the legal culture of the nation. However, the concept of legal culture was still not in use, though it was present as a phenomenon that worked as a regulatory idea for the national lawmakers.

National law prevailed as an ideal until the Second World War, but was then partly discredited – it failed to be a barrier to oppression, was even used to oppress, because its content was not tied to external guidelines. In the aftermath of the war, the UN issued two Human Rights Declarations in 1948. The European Council was established the year after, and a separate European Human Rights Charter was issued in 1950. The European Steel and Coal Community was established in 1951, and became the first move towards the European Community (EC) and the European Union (EU). Both the European Convention on Human Rights and the laws produced by the EC and EU are transjurisdictional in their character, since they are applied across the borders of jurisdictions with their own law and they have broken the nation state's legal monopoly that has been in force for about 150 years.

From the beginning of the Twentieth Century, the concept of legal culture came into use. In Norway it was used as a means of dealing with the observation that, despite the strength of the unifying structures of the nation state, the same legal ideas were not necessarily shared by all citizens. This was driven by the awareness that lawyers and non-lawyers would be unlikely to share the same concepts of law. Legal culture was thus used to explain internal differences in Norway at the first half of the 20<sup>th</sup> century.<sup>3</sup> This aspect of legal cultural thinking is still determining the split between the broad and narrow legal culture, to

---

<sup>3</sup> Francis Hagerup, *Ret og kultur i det nittende aarhundrede*, ed. Aage Friis, Det Nittende aarhundrede : skildret af nordiske videnskabsmænd (København: Gyldendalske Boghandel Nordisk Forlag, 1919) pp. 1-13. See as well Francis Hagerup, "Det psykologiske Grundlag for Retten", *Tidsskrift for Retsvidenskab* 20 (1907) and even Herman Scheel, "Om Rettens Grund som Udgangspunkt for Læren om Retskilderne", *Tidsskrift for Retsvidenskab* 20 (1907) and Ragnar Knoph, *Ret og rettsbevissthet* Det Norske studentersamfunds folkeskrifter (Kristiania: Samfundet, 1923).

which we will return later. However, after the Second World War legal culture instead became more of a concept used to frame the underlying reasons for similar legal issues being dealt with differently in different nations. Especially through the process of making the European Convention on Human Rights, and the continuous process of making EC law, and the activity of the Human Rights Court in Strasbourg and the Court of Justice of the European Communities in Luxemburg, this has become evident in Europe.

The nation state is still the most extensive and powerful administrative unit, at least in Europe, and it produces large amounts of national law. The demise of the nation state and its law might, hence, only be pronounced with great difficulty. Everyone one of the 47 nations that are members of the Council of Europe now issue their own national law with an obligation to make it in accordance with the European Human Rights. The 27 members of the EC, and the three members of the European Free Trade Association (EFTA) that are part of the EEA-agreement, are all obliged to ensure that their national law is in accordance with EC law. Given the continuous expansion of the fields covered by these two transjurisdictional sets of law, more and more national law systems have them as their focal point, adjusted as much by local factors as the system will allow without the loss of coherence. The supremacy of national law created in the Nineteenth and first half of the Twentieth Century is thus moribund in Europe.

The lessons learned from this speedy journey through legal history are, firstly, that any law with transjurisdictional aspirations must be adjusted to local/national level to maintain relevance. In other words, any law with transjurisdictional aspirations must give up parts of its transjurisdictional character to be applicable. Secondly, legal culture has long been a phenomenon taken into account when dealing with law with transjurisdictional aspirations, but not as an explicit concept. Thirdly, legal culture, in an era of renewed importance for law with transjurisdictional aspirations, is a concept that makes us able to understand central processes within the shaping of law affecting individuals in their everyday life. Hence, the answer to the question “Why legal culture?” is that there is a need for a concept to frame actual legal historical and current aspects of law that have shaped law.

### **Drinking Champagne – framing and defining the concept of legal culture**

The historical journey above proved that legal culture is a concept we can only, with difficulty, manage without if we want to frame actual legal historical and current aspects of law that have shaped law. However, why a framework to understand law? Let us start with a classic third party conflict: Person A sells his/her bike to B, who pays, but will return the next

day to pick it up. Later the same day, A sells the same bike to C, who pays and takes the bike with him/her. When B returns the next day the bike is no longer in the hands of A, and A has even spent all the money he/she received from both B and C. B then turns to C, claiming that he/she bought the bike first. C's answer to B's claim is that he/she might have bought the bike first, but C first took possession of the bike. If this dispute evolves into a legal dispute, the solution to the conflict will vary in different European countries. For example, in Norway, the bike will be considered the property of C, in Italy the property of B, while in England the claim B makes against C will be rejected since B and C are not parties in the same conflict, and other procedural instruments must be applied to resolve the dispute. There are, thus, several ways of settling this conflict, but no nations might, without consideration, alter its legal norms in this field to settle it in the same manner. The reason is that the way this specific conflict is settled is just a reflection of how third party conflicts are viewed and dealt with in general, and large sections of law, legal rules, principles and the entire spirit of this field of law will, hence, have to be changed to settle this conflict in another way without creating incoherence in the system of law. The concept of legal culture might, hence, in this case be used to explain that the legal rule produced to settle one single conflict is not an isolated norm, but part of a larger corpus consisting of law, vaguer principles and general ideas.

The example used above is related to legal culture in the narrowest sense, namely legal culture as mainly legal. The reason is that the way to settle such a third party conflict is less a question of morals – of ideas of right and wrong – more one of inner legal factors. Legal culture might as well be understood in a wide manner, in the sense that it is more closely tied to other fields of society. For instance, drink-driving has been viewed and dealt with differently in the eyes of the law in different parts of Europe, and even within different nations. This has nothing to do with legal technicalities, or other internal legal factors, little to do with law, and more to do with everything from social norms to eating and drinking habits, and even with taste. To unify law in this field therefore demands that attention is not solely directed towards the crime, but towards different social phenomena that also shape law. By using the concept legal culture the focus, in this case as in the one above, moves from the particular to the context. Legal culture, in the narrowest or widest sense of the concept, is difficult to manage without, because it puts the focus on historical and present aspects shaping law.

Legal culture as a concept is still difficult to manage. The advantage of the concept is that it refers to something outside the actual legal rule or principle that is of relevance to understanding and applying it. But there is a natural boundary around legal rules and

principles, and once leaving their strictly legal territory one might easily get lost in the wilderness of a multitude of historical, political, religious, social, *etc.* factors that might be of importance to understand law. When studying the use of the concept, a comparison with champagne is relevant: The more you get of it, the more nonsense is likely to be the outcome. To avoid the nonsense that follows when abuse replaces use, an approach must be found that delimits the set of relevant factors when moving outside the boundaries of positive law.

The most obvious way out of the lurch is to define the concept closely. However, firstly, it must be clearly separated from three related concepts: Legal families, legal systems and legal traditions. We have seen that legal culture is not a term with a long history. It has thus not for long been an explicitly exposed part of comparative law, though it has of course played a role. Instead, legal families have traditionally been a theme within comparative law.<sup>4</sup> As there are different degrees of relatives in a family, different legal families can be regarded as related in different degrees depending on the amount of similarities. This approach to comparative law is unbiased, but is often practiced with a bias. For instance, a German legal family is seen as the area influenced by German law, where German law is viewed as a kind of mother law and the law in other places as offspring. Such an approach is based on an idea of export of law from centre to periphery. This was an image that gained credence with the codification of law in the Nineteenth and Twentieth Centuries, when one nation might adopt the code of another. For instance, Japan adopted the German Civil Code of 1900, and the Swiss Civil Code of 1912 was adopted by Turkey. However, any adoption of law is far more complicated than mere acceptance, as will be touched upon more closely in this book when the legal cultural filter is taken as the theme. For now, it is sufficient to point out that adoption of law is too eclectic to establish a single line of family relationship. Hence, applying the term legal families as an instrument to frame actual legal historical and present aspects of law easily draws attention away from the complexity revealed by studying differences towards the simplicity revealed by studying similarities.

The concept of legal culture is not the only alternative available to legal families, since one might also speak of merely legal systems. A legal system is a totality of interconnected aspects of law. We might, therefore, speak of a Norwegian legal system, and by that refer to all aspects of law in Norway that are related to each other. There is nothing wrong in including courts, lawmakers, ideas of justice, legal methods, legal principles and legal rules in

---

<sup>4</sup> See the discussion on legal families and alternative classifications in Konrad Zweigert and Hein Kötz, *Introduction to Comparative Law*, trans. Tony Weir, 3 ed. (Oxford: Clarendon Press, 1998) pp. 61-67, and in Michael Bogdan, *Komparativ rättskunskap* (Stockholm: Norstedts juridik, 2003) pp. 76-83.

a legal system. On the other hand, it is the law and the institutions of law,<sup>5</sup> and not the ideas and expectations of law, which are seamlessly related to the term. Hence, by applying the term legal systems to frame actual legal historical and present aspects of law often draws attention to the institutional aspects of law.

In short, one might say that the concept of legal systems often is rendered unsuitable as an instrument for understanding law by an overly institutional approach. Yet another alternative term for legal culture is legal traditions, applied by Patrick H. Glenn in his *Legal traditions of the world*. A legal tradition is, like a legal culture, made up of ideas of and expectations to law. But the actual shaping of law according to these ideas and expectations are done in institutions, or at least institution-like structures. The problem with the term legal traditions is that it evokes an image of practices independent of institutions. A result is that the concept works fine when dealing with larger and incoherent geographical units like civil and common law, which might very well be referred to as legal traditions. The reason is that the institutional element is very weak – there are no common civil or common law institutions shaping the civil and common law. An essential part of legal history is the establishment and development of institutions. This reveals the inadequacy of the concept of legal traditions to frame actual legal historical and present aspects of law.

The concept of legal culture is hence in this book preferred to that of legal families, legal systems and legal traditions. What, however, is the actual content of legal culture? Günter Bierbrauer, a German professor of Social Psychology, has attempted the following explanation:

“Law and legal systems are cultural products like language, music, and marriage arrangements. They form a structure of meaning that guides and organizes individuals and groups in everyday interactions and conflict situations. This structure is passed on through socially transmitted norms of conduct and rules for decisions that influenced the construction of intentional systems, including cognitive processes and individual dispositions. The latter manifest themselves as attitudes, values, beliefs, and expectations.”<sup>6</sup>

Another attempt has been made by David Nelken, an Italian professor of Law:

“Legal culture, in its most general sense, is one way of describing relatively stable patterns of legally oriented social behaviour and attitudes. The identifying elements of legal culture range from facts about institutions such

---

<sup>5</sup> See Lawrence Meir Friedman, *The Legal System: a Social Science Perspective* (New York: Russel Sage Foundation, 1975) pp. 6-7 for a similar observation.

<sup>6</sup> Günter Bierbrauer, "Toward an Understanding of Legal Culture: Variations in Individualism and Collectivism between Kurds, Lebanese, and Germans", *Law & Society Review* 28 (1994) p. 243.

as the number and role of lawyers or the ways judges are appointed and controlled, to various forms of behaviour such as litigation or prison rates, and, at the other extreme, more nebulous aspects of ideas, values, aspirations and mentalities. Like culture itself, legal culture is about who we are not just what we do.”<sup>7</sup>

Both Bierbrauer’s and Nelken’s definitions provide us with essential information on the character of legal culture. At the same time, both attempts to capture its essence are descriptions rather than definitions. The reason is that a strict definition eliminates, and a lenient definition includes too many factors. The middle ground is almost impossible to find. There are two reasons for this.

Firstly, because legal culture might, as we have seen, be understood in both a narrow and wide sense. The wider the scope, the more factors will make their presence noticed, and the more lenient the definition will have to be. In this book, the theme is legal culture in a narrow sense. As we will see, this choice does not imply a rejection of the existence, or even the relevance, of a wide concept of legal culture. The choice is solely made to reduce the concept to a size that allows it to be so framed that it may serve as an instrument of analysis.

Secondly, legal culture might cover geographical areas of very different sizes. We might speak of a Christian or a Hindu legal culture, covering the areas where these religions are present to such an extent that there are applied Christian- or Hindu-based, or at least influenced, legal norms. Or we might speak of the civil law tradition as a European continental legal culture based on a Roman and Canon Law inheritance, or common law as a separate legal culture deriving from the English legal system. Furthermore, we might speak of regional legal cultures, like a Shetland, Basque or Transylvanian legal culture, partly making up their own legal cultures by mixing values, principles and legal rules lying in the crossroads of different realms and later nations. Or, we might speak of the very local legal cultures of institutions like for example a court, partly basing its rulings on norms differentiating from those applied by other courts within the same legal system.

What all of these differently sized legal cultures have in common are communication structures. That is, there exists means for communicating legal values, principles and rules. For large geographical areas, communication is rarer and more general, whilst still embracing broad areas fields of both life and law, since it is values more than rules that will be shared. For the smaller geographical areas, communication will be more frequent and more particular, and dealing with more specific fields of law since it will concentrate more on rules than values.

---

<sup>7</sup> David Nelken, "Using the Concept of Legal Culture", *Australian Journal of Legal Philosophy* 29 (2004) p. 1.

All of these different-sized legal cultures might be seen in history, and they still play a role today. However, as pointed out previously, the nation state came to be an essential entity of identity for Europe from the mid Eighteenth Century, along with its political and economical importance. The nation state, with its national and uniformed law, is historically actually an abnormal state of affairs. Still, the nation state with its national law is based on extremely strong and efficient structures for communication. This, combined with the role it came to play in the minds of Europeans, ensured that nation states rose to become the most important legal cultural unit. Even if the nation-based legal cultures in Europe today are strongly challenged by both the transjurisdictional European Convention on Human Rights and EC law, the nation states are still the basic units within both. One important reason for this is that neither the Council of Europe nor the EC are able to create a fully supranational court hierarchy or an executive power liberated from the national ones. The transjurisdictional law created is hence partly exhausting the national legal cultures, but is still far from killing or even seriously wounding them as has been the case with the supremacy of national law. However, as will be seen from several articles in this book, with the supremacy of law comes a supreme opportunity to shape legal culture. In the end, what is experienced as exhaustion might prove to be the beginning of the end.

To make the concept of legal culture more manageable – to drink the champagne more soberly – it will in this book, if not stated otherwise, firstly be applied as a national legal culture. Secondly it will be applied in a narrow sense. Lastly, these two perquisites allow the following definition: legal culture represents ideas and expectations of law that are made operational by institutional(-like) practices. This definition is not wholly original. For instance it comes close to one Lawrence M. Friedman, a pioneer in legal culture studies, has applied: legal culture is “ideas, attitudes, values, and opinions about law, the legal system, and legal institutions in any given population.”<sup>8</sup> John Bell has defined legal culture as “a specific way in which values, practices, and concepts are integrated into the operation of legal institutions and the interpretations of legal texts.”<sup>9</sup> However, the transformation of legal culture to a model is all original.

---

<sup>8</sup> Lawrence Meir Friedman, "Some Thoughts on Comparative Legal Culture", in *Comparative and Private International Law - Essays in Honor of John Henry Merryman on his Seventieth Birthday*, ed. David S. Clark and John Henry Merryman (Berlin: Duncker & Humblot, 1995) p. 53.

<sup>9</sup> John Bell, "Comparative Law and Legal Theory", in *Prescriptive Formality and Normative Rationality in Modern Legal Systems*, ed. W. Krawietz, N. MacCormick, and G.H. von Wright (Berlin: Duncker & Humblot, 1994) p. 70.

## **An anatomical theatre of legal culture – dissecting legal culture to detect its inner structures**

Legal culture is still a concept that is difficult to manage after it has been separated from those of legal families and legal traditions, and after being defined. To obtain a larger degree of clarity we have to search for the structures that determine the *style* of a legal culture, to apply a term used by Konrad Zweigert and Hein Kötz in their *An introduction to comparative law*.<sup>10</sup> Let us hence dissect the concept of legal structure to get a closer look at its inner structures.<sup>11</sup> The first we see then is that the body and soul of a legal culture is its institutional and intellectual structures.

Before we look into the institutional and intellectual structures of a legal culture, we have to ask what a structure is in this context? A structure is easily seen as the static framework around which a building is erected. In such a context a structure cannot be changed without the building falling down. Speaking of the institutional and intellectual structures of a legal culture with this image in mind, a legal culture becomes a static unit that cannot be altered without fatal consequences. This is, as we will explore below, all false; a legal culture is both dynamic and static. Hence, one ought instead to imagine the structures of an atom, where the neutrons are structured around a proton by electricity. These structures are firm, but might change very fast through fusion or fission. New structures are then created, and might again change by expansion or reduction. This is also the case with a legal culture – it has firm structures, but the structures are highly changeable, and thus is at the same time both dynamic and static.

The institutional structure of a legal culture is, in short, and not surprisingly, made up of institutions that shape law through their practices. Law is separated from other spheres of life by some form of institutionalising. In non-state societies these institutions are extremely weak, but might still, with terminological generosity, be called institutions. When, in early medieval Norway, a man killed another man whom he found in bed with his wife, he would afterwards have to go to his neighbours with the bloody sheet and announce his deed to make the killing legal. There is not much separating this killing from any other, except the condition – in bed with his wife – and the actions – the presentation of the sheet and the announcement.

---

<sup>10</sup> Zweigert and Kötz, *Introduction to Comparative Law* pp. 67-72. In German Zweigert and Kötz speak of *der Stil*.

<sup>11</sup> This is also done by Mark van Hoecke and Mark Warrington, "Legal Culture, Legal Paradigms and Legal Doctrine: Towards a New Model for Comparative Law", *The International and Comparative Law Quarterly* 47 (1998) pp. 514-515. They end up with six structural elements as well, but only legal methodology is a structural element in both their and this theory of legal culture.

The condition and action required are the stamp mark of law, and signalizes that a first institutionalising of law has taken place.

Law consists of two major kinds of institutions: Conflict resolution and norm producing institutions. The most basic institutions are those settling conflicts, since the only reason law exists is that it resolves conflicts in a manner that either limits the use of violence, or totally eliminates the use of violence as a means of resolving conflicts. When law does not resolve conflicts, the will of the strongest replaces law. In non-state societies such conflict-resolution institutions will simply be limits on the use of violence, or *ad hoc* mediation organs. With the emergence of a state-like power the use of violence as a legitimate way of resolving conflicts will cease, and the mediating organs will by and by meet regularly, be more professionalised and finally turn into courts with presiding judges. These courts will then be organized in a hierarchy with appeals regulating access from lower to higher court levels. In the end, the court hierarchy will be supplied by mediating courts, administrative courts, etc. easing the work-load of the regular courts. With the internationalisation of law, we are entering a phase of multiple multi-level conflict-resolution institutions.

Norm production is originally a by-product of conflict resolution. Each time a case is settled a norm is produced. By and by these norms will be reused in similar cases, and case law appears. The case law will again be put into system and developed by a lawmaker, and at this time conflict resolution and norm production have become the affairs of two distinctly different institutions within the institutional structure of a legal culture. However, it must be borne in mind that courts never cease to create norms, even when this formally is exclusively the domain of the lawmaker. The reason is the limitation on human fantasy: it is impossible to foresee and prescribe a solution to all possible conflicts. Hence, courts have to supply the legal system with legal norms to clarify or alter norms made through lawmaking, and to fill the lacunae of laws. It must also be bore in mind that there are other norm producers than courts and lawmakers. Customary law is for example produced through the intricate interplay between the practice of legal subjects and the recognition of the courts, while systems of law, principles and legal rules are created by legal science, *etc.* With the internationalisation of law, legal norms are produced in an even larger multitude of manners.

Somewhat simplified, we might sum up by saying that the institutional structure of law is a question of who?: Who settles conflicts and who produces legal norms? These are then the two structural elements within the institutional structure of a legal culture. The intellectual structure of a legal culture is a question of what?: What is the idea of justice, the legal method, the degree of professionalization and character of internationalization dictating the

resolution of conflicts and the production of legal norms? These are the structural elements of the intellectual structure of a legal culture. It is evident when asking what idea of justice and what legal method, because they are both obvious mental constructs with no parallels in the physical world. But professionalization and internationalization might be regarded as facts rather than ideas. My point is that the degree of professionalization and character of internationalization influences how law is viewed and understood, and is therefore, as far as legal culture is concerned, part of the intellectual structure.

The production and application of legal norms do not take place in an intellectual vacuum. Rather, there are several intellectual factors that dictate how norms are made and applied. The most basic is the idea of justice. Just like conflict resolution, justice is a basic demand directed towards law. That is, if law to some extent does not settle conflicts, it loses all legitimacy, and just solutions have a much higher degree of legitimacy than those experienced as unjust. It must be kept in mind that what is considered just is not constant, but varies from place to place and time to time. Further, that the idea of justice might as well vary between legal fields. For instance, both equivalence and equity are very important within tort law, while predictability prevails within law of obligations and all public law as an idea of justice in Norway today.

To make an idea of justice operative – that is, to solve a specific case in accordance with an idea of justice – a method is of great assistance. A legal method is simply the manner in which ideas of justice, values, principles or laws are turned into legal rules used to settle a conflict. While an idea of justice might be shared by lawyers and non-lawyers alike, legal method appears, and is more and more specialized, with an increased professionalization of law. The reason is that it is not legal knowledge, but methodological knowledge, that separate lawyers from the laymen.

Firstly, professionalization means that the persons handling law on behalf of a society spend more and more of their time on legal issues. Secondly, it means that there are special criteria to fulfil to be trusted with the position of handling law. Such criteria will, in short, often at first be a good reputation, later practical legal experience, and in the end a legal education. But all kinds of professionalization have the same effect – it makes lawyers obtain an internal view of law. This implies that good law in the eyes of the professional becomes more and more a question of internal correlations, while good law for the unprofessional is still a question of justice in each individual case.

It has already been pointed out that the nation state played a central role first in the Nineteenth Century, and internationalization is not possible before there are nations producing

national law that might be internationalised. However, internationalization is here used on all kinds of influence of norms produced outside jurisdictional boundaries and norms from outside such boundaries might change how law is perceived inside those same boundaries. The power to change is much dependant on both quality and authority. For example, Roman law had in most European realms no formal status as law from the High Middle Ages till the end of the Early Modern period, but it was frequently used to interpret local law, fill in lacunae or even at times set local law aside. This was due to the quality Roman law was thought to have, and the large degree of authority it possessed through its quality, age and origin in the Roman Empire.

To sum up, then, the intellectual structure of law is ideas and expectations of law that set up the framework for how law is shaped within the institutional structure, while the institutional structure is the framework for how law is imagined within the intellectual structure. In other words, the institutional and intellectual structures exist in a symbiosis. Just as we cannot do without institutions making and applying law, we cannot do without ideas of how law ought to be. Their relationship is dialectic in the way that it is not one that shapes the other, but they influence each other in a continuous process. Neither one can do without the other, nor together do they make up the style of a legal culture.

### **An historical theatre of legal culture – dissecting legal culture to detect its historical phases**

With the display of the different structural elements in the institutional and intellectual structure of a legal culture, we have seen that they are not historical constants, but change over time. This is a very important acknowledgement, since it keeps us from subscribing to the idea of a constant and unchangeable essence of legal cultures – the existence of a legal cultural spirit independent of the changes in society over time. History is often regarded as a crucial aspect of a legal culture.<sup>12</sup> This is unmistakably true, and best understood when applying the terms and analytical tools Space of Experience (*Erfahrungsraum*) and Horizon of Expectations (*Erwartungshorizont*), developed by Reinhard Koselleck.<sup>13</sup> His point is that you cannot have expectations beyond what might be deduced from your experience. Experience in this context includes both the conscious and unconscious, and it embraces what has been read, heard, observed, discussed and done. In this context we might conclude that a legal culture is shaped by different kinds of historical events in a society. Together they form

---

<sup>12</sup> Zweigert and Kötz, *Introduction to Comparative Law* pp. 68-69.

<sup>13</sup> Reinhart Koselleck, *Futures Past : on the Semantics of Historical Time* (New York: Columbia University Press, 2004).

the legal cultural base that gives it a static character. But since new experiences are continuously made, a legal culture will be ever changing, and this is what gives it its dynamic character. This is why Pierre Legard's dismissal of converging European legal systems already has proven false.<sup>14</sup>

A legal culture is in constant flux, but do not change at a constant rate. In general, we might say that each particular part of a legal culture often goes through changes, that each section more rarely changes, and that change in the entire legal culture takes place only in exceptional periods of legal cultural profound disturbance. This must have been the general idea of Franz Wieacker when he gave his lecture on "Foundations of European legal culture", first held in 1983. In this lecture Wieacker split the European legal culture into four different phases – Early Middle Ages, High and Late Middle Ages, Early Modern Age, and Modern Age – due to the major changes that took place at the transmission from one period to another.<sup>15</sup> At least, in a Norwegian context, it is more useful to define only three phases: the first phase until 1260 with none or only weak legal institutions and a case to case approach to all aspects of law, a second phase from 1260 to 1590 with independently ordered legal institutions and a sectional approach to all aspects of law and a final phase from 1590 until the present day with strengthening ties between the different institutions and a systematic approach to all aspects of law. Based on the characteristics of each period, they might be named Pre Legal Order, Legal Order and Legal System. The transformation from one period to another is caused by a radical change in the institutional and intellectual structure of the legal culture. Despite that, a single event might be seen as the very Archimedes fulcrum, it must be borne in mind that the event will still be one in a chain of events leading up to and continuing after the turning point.

One further point to be made in the historical theatre of legal culture, is that the changes that historically have taken place in law are normally parallel with changes in other spheres of society, like within politics, religion, economy, philosophy, technology, art, etc. This is due to the close connection between the legal sphere and other spheres in society. Hence, there is also a close connection between legal culture and culture in general. To single out law, both as a sphere in society and as a cultural aspect, is to cause a loss of context and is thus partly misleading. However, making legal culture more accessible by studying it in the

---

<sup>14</sup> Pierre Legrand, "European Legal Systems Are Not Converging", *The International and Comparative Law Quarterly* 45 (1996).

<sup>15</sup> Franz Wieacker, "Foundations of European Legal Culture", *The American Journal of Comparative Law* 38 (1990).

narrow sense is an unfortunate consequence. It is very much like studying a waterfall instead of the ocean to detect the character of water, and this must be borne in mind.

Lastly, an appropriate question to ask is whether legal culture is a description of law or an active factor in legal historical and present aspects of law. The answer is that any legal culture is a construct, and hence a description. On the other hand, legal culture is a description applied to grasp the legal historical and present aspects of law. Thus, the concept of legal culture is like the concept of for example physics. There is no such thing as physics, but there are many elements involved in numerous and continuous processes that might be better framed, arranged and analysed when seen as a part of the concept physics. Legal culture is hence a concept difficult to manage, but difficult to manage without.

To sum up, the style of a legal culture is historically relative, since the institutional and intellectual structure has changed over time. These changes have not been constant, and only under exceptional circumstances have they affect the entire legal culture and brought it from one phase to another. The changes have not occurred in law alone, but have had parallels in changes in the entire society and culture.

### **A post-discourse discourse**

We have seen that on dissecting a legal culture, we find that it consists of a institutional and a intellectual structure. The institutional structure sees the institutions settling conflicts and producing norms, and the intellectual structure is the ideas shaping law. This is the heart and soul of a legal culture, and the result of the dissection might be turned into a model:

<i>Legal historical period</i>	<i>Legal culturally structures and structural elements</i>					
	<b>Institutional structure</b>		<b>Intellectual structure</b>			
	<i>Conflict resolution</i>	<i>Norm production</i>	<i>Idea of justice</i>	<i>Legal method</i>	<i>Degree of professional-ization</i>	<i>Character of international-ization</i>
<i>Legal System</i>	Court hierarchy	Lawmaking	Predictability	Deduction	High	Systems of law
<i>Legal Order</i>	Courts	Lawmaking and court rulings	Equity	Differentiation	Some	Chunks of law
<i>Pre Legal Order</i>	Mediating organs and violence	Through conflict resolution	Equivalence	Analogy	Non	Bits and pieces of law

One question to be asked is whether this model is true or false? It is false, just as all models are false in the sense that they categorize and simplify something that might profitably be viewed as more overlapping, diverse and complex. A model is never more than the mere shadow of what it is supposed to reflect. Although, models are still useful, since they make the complex easier to grasp, comprehend, treat and discuss. This model of a dissected legal culture hence has to be studied and used with several reservations in mind.

First, it must be noted that legal culture might be dissected to a much greater degree than has been attempted here, which would result in a much more complicated model with several more structural elements making up the institutional and intellectual structure. For instance, there are institutions administering law, institutions teaching law, and there are legal ideologies bridging ideas of justice and legal method, just to mention parts of the institutional and intellectual structure of a legal culture not accounted for in this very preliminary dissection.

Second, the model is non-nuanced. For example; that the state is structured does not imply that all parts of it are similarly structured, just that it as a whole may be characterized as structured. Further, it might be noted that the idea that justice is predictable does not imply that equity and equivalence are not also present in the legal mind, only that predictability is dominating and the regulative idea that exceptions are made from.

Third, it must be bore in mind that the model will not necessarily fit perfectly when applied to specific legal cultures and it might even display contradictions to what ought to be logical. The English state is, for instance, just as structured as any other West European state. On the other hand, the English courts are less stringently structured, court rulings still central when it comes to norm production, the role of equity stronger, the legal method focussed on differentiation, and the degree of professionalization still somewhat lower, while the degree of internationalization is the same as in other West European countries. Even if the model does not always fit perfectly, it is a perfect starting point for an analysis. The reason is that it still might serve as an instrument of dissection, even though the actual dissection might display other features than expected.

Fourth, there is a logic correlation between the different parts of this model. For instance, in a structured state you will find a structured legal system with a strict court hierarchy, able to uphold predictability as an idea of justice, much by the use of a deductive method, thought out and applied by educated jurists and able to receive entire systems of law. But the existence of a logical correlation does not exclude inner tensions. For instance a high degree of professionalism is the result of and a condition for a legal system with a tight inner structure, and this structure leave, as a starting point, little room for external input.

Fifth, the model does not fit perfectly with the situation in Europe today. Internationalization means that the state has to loosen its structures to be able to adjust to the transjurisdictional structures of especially the European human rights system and the EU/EC/EEA systems. Court hierarchies are supplied with supranational courts, binding legal norms are produced by external norm producers, predictability is difficult to uphold as an idea of justice when the multitude of conflict settling institutions are not part of the same structured system, deduction is difficult when terminology varies from language to language and the legal education is not similar. It might be that the legal cultures of Europe today are entering a new period that ought to be entitled Systematic Legal Order. This will be a period when the tight structures of each nation state and each legal system will be loosened up to fit tighter together with other states. In this process, the tight bounds between nation states and legal cultures will slowly be loosened as well and in the future the national legal cultures might have to give way to larger entities such as, just possibly, a European legal culture.

This just might happen – one day history will show. What we do know is that, for the time being, European legal cultures are encountering each other frequently in common institutions and, to understand the history of law, the processes of law in present day and the future of law, we need to know more about the character of this legal cultural rendezvous.

## **A closing discourse before opening the question of a rendezvous of European legal cultures**

In short, legal culture is defined as ideas and expectations of law made operational by institutional(-like) practices. In this definition, we see that legal culture is a question of an institutional structure as a framework for the structural elements conflict resolution and norm production as essential legal practices. Further, we see that legal culture is a question of intellectual structure, as a framework for the structural elements idea of justice, legal method, professionalization and internationalization as essential for ideas of and expectations to law. We have seen that the focus on the interplay between the institutional and the intellectual is more easily encompassed by the term legal culture than legal system or legal traditions. At the same time, legal culture does not carry with it a bias model of the legal dominance of centres towards peripheries, which makes legal culture a more suitable term to apply when studying the legal historical and present aspects of law. Finally, we have also seen that these structures have changed over time, with increased expansion, coherence and strength as the general trends. Lately, however, after the growing importance of the European Human Rights and EC and EU law, these structures have been linked to a transjurisdictional system of law with far more extensive but loose structures. The effect of this can still only be anticipated, but legal culture is a concept that is a handy instrument for framing, arranging and analyzing the changes now taking place.

